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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964 — 1965

No. 1067

THE HONORABLE EDWARD SMALL,
CIRCUIT JUDGE,
Petitioner,
vs.
FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

CASE NO. _____

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE

Petitioner,

vs.

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner, the Honorable Richard Kelly, Circuit Judge, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Florida entered in these proceedings on June 17, 1970.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, which is reported at 238 So.2d 565, appears in Appendix "A" appended hereto at pages 13-40. The opinion or report

of the Judicial Qualifications Commission is unreported and appears in the separately bound Appendix "B" filed herewith at pages 11-23.

JURISDICTION

The opinion of the Supreme Court of Florida was entered on June 17, 1970. A timely Petition for Rehearing was denied on September 14, 1970, and this Petition for Certiorari was filed within ninety days of that date. The Order Denying Petition for Rehearing appears in Appendix "A" appended hereto at page 41. This Court's jurisdiction is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED FOR REVIEW

The primary questions presented are:

I

WHETHER THE PROCEEDINGS BROUGHT BY THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION, THE RECOMMENDATIONS OF THAT COMMISSION, AND THE ACTION OF THE SUPREME COURT OF FLORIDA IN PUBLICLY REPRIMANDING PETITIONER FOR PUBLICATION OF A PETITION RECOMMENDING REFORMS IN THE ADMINISTRATION OF THE COURTS IN HIS JUDICIAL CIRCUIT ABRIDGE PETITIONER'S FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II

WHETHER ARTICLE V, SECTION 17A(3) OF THE FLORIDA CONSTITUTION, AS CONSTRUED AND APPLIED SO AS TO ALLOW THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION TO COMBINE THE FUNCTIONS OF INVESTIGATOR, GRAND JURY, PROSECUTOR, AND JUDGE AND JURY OF FACTS AND LAW, IS INVALID UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT DENIES TO PETITIONER DUE PROCESS OF LAW.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Constitution of the United States, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States, Amendment XIV §1:

". . .nor shall any state deprive any person of life, liberty or property without due process of law. . ."

Florida Constitution, Article V § 17A(3):

". . .After such investigation as it deems necessary, the judicial qualifications commission may conduct a hearing concerning the removal, discipline or re-

tirement of a justice or judge. . .If after hearing. . . the commission finds good cause therefor, it shall recommend to the supreme court the removal, discipline or retirement of the justice or judge. . ."[1]

Florida Judicial Qualifications Commission Rules Nos. 8, 9, 11, 12, 21, 22, and 23 (published at 207 So.2d 443)[2]

STATEMENT OF THE CASE

Petitioner, the Honorable Richard Kelly, is a judge of the Sixth Judicial Circuit of the State of Florida and is a resident of Pasco County, Florida. Judge Kelly was first elected a circuit judge in November, 1960 and was re-elected to a second successive term in the general election of November, 1966.[3] In 1963 Judge Kelly was the subject of impeachment proceedings before the Florida Legislature; after the prosecution completed its case the Senate dismissed the charges and acquitted the judge without any defense being necessary.

In February, 1968, Judge Kelly was elected presiding judge of the Sixth Judicial Circuit. Between the time of his election and March 19, 1968, Judge Kelly made certain suggestions and sought to institute certain proposals relative to the administration of the coorts in the Sixth Judicial Circuit. On March 19, 1968, Judge

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[1] The complete text of Article V §17A, Florida Constitution is set forth in Appendix "B" filed herewith at pages 43-46.

[2] The pertinent text of the aforesnid rules is set forth in Appendix "B" filed herewith at pages 46-50.

[3] In Florida, the Circuit Court is the highest court of general jurisdiction.

Kelly was notified of the determination of a majority of the other judges in the Circuit that Judge Kelly be removed or recalled as presiding judge. Judge Kelly thereafter announced his resignation as presiding judge. (B 50-52)[4]

On April 5, 1968, Judge Kelly filed with the Clerk of the Sixth Judicial Circuit in Pinellas County, Florida, a Petition addressed to the judges of the Sixth Judicial Circuit. (A 1-12)[5] In his petition he sought to explain to the public why he had resigned as presiding judge and set forth a description of conditions that had and did exist and as a solution recommended certain administrative reforms.

In June, 1968, the Florida Judicial Qualifications Commission (hereinafter referred to as the Commission) notified Judge Kelly that it was undertaking to investigate Judge Kelly's conduct in publishing the aforesaid Petition to determine if Judge Kelly's conduct may have been "conduct unbecoming a member of the judiciary." (B 1) The Commission advised Judge Kelly that it would meet in Pasco County. Subsequently, the Commission again notified Judge Kelly of its continuing investigation and of its intention to meet for a second time in Pasco County. (B 52-53) During this investigation by the Commission, the witnesses who later testified at the trial, were interrogated under oath by the Commission in Judge Kelly's asence; and in November, 1968, the Commission filed formal charges against Judge Kelly. (B 2-4) In response to these formal charges, Judge Kelly filed a Motion to Dismiss the charges on

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[4] "(B)" refers to separately bound Appendix "B" filed herewith.

[5] "(A)" refers to Appendix "A" appended hereto.

the grounds, among others, that the Commission was without jurisdiction over Judge Kelly in that its rules and conduct violated Judge Kelly's constitutional right to freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States and further violated Judge Kelly's right to be afforded due process of law under the Fourteenth Amendment to the Constitution of the United States. (B 5-7) The Commission, on its own initiative, then entered an Order striking Judge Kelly's Motion to Dismiss on the ground that the rules of the Commission do not provide for the filing of such Motions. (B 7)

Judge Kelly then filed an Answer to the charges and raised in the Sixth Defense of said Answer the constitutional infirmities previously raised by means of his Motion to Dismiss, that is, the violation of his right to freedom of speech and his right to be afforded due process of law. (B 8-10)

In January 1969 and in March 1969, the Commission conducted hearings at which its designated counsel served as attorney for the Commission and the Commission itself acted as trier of fact and adjudicator of the law. The hearings were held for the purpose of inquiring into the charges filed by the Commission against Judge Kelly. At the hearings, Judge Kelly was represented by counsel who were allowed to present evidence and cross examine the witnesses produced by the Commission and its attorneys.

On May 7, 1969, the Commission filed with the Supreme Court of Florida its report, including background, findings of fact, conclusions and recommendations. (B-11-23) The Commission found that there was sufficient evidence to support specific allegations relating

to the charge against Judge Kelly of conduct unbecoming a member of the judiciary. The findings of the Commission with respect to this charge were based solely on the Commission's conclusions as to Judge Kelly's method and motive in filing his Petition with the Clerk of the Circuit Court. Having found and concluded that Judge Kelly's filing of the Petition constituted conduct unbecoming a member of the judiciary, the Commission recommended to the Supreme Court that Judge Kelly be publicly reprimanded for such conduct and that he be admonished, among other things, to cooperate with his fellow judges, follow the normal method for seeking procedural changes as to the administration of justice, and refrain from seeking personal publicity or attempting to advance his personal ambitions through the public information media. (B 21) The Commission also recommended that Judge Kelly restrict his duties to Pasco County and refrain from service in Pinellas County, both of which comprise the Sixth Judicial Circuit. The Commission further recommended that the entire record of the inquiry may be introduced into evidence in any subsequent inquiry which may be brought before the Commission concerning Judge Kelly.

Judge Kelly filed a timely Petition with the Supreme Court of Florida seeking to have the Supreme Court reject the recommendations, findings and conclusions of the Commission. (B 24-34) In his Petition to the Supreme Court, Judge Kelly urged that:

> "2.D. The procedure by which Petitioner was investigated, tried and adjudged by the Commission violated the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. . ." (B 31)

"3. Respondent [Judge Kelly] has been denied due process of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States. . .in that:

'(a) The Commission was apprised of all facets and features of the investigation of petitioner prior to the hearing upon the merits of the charges against petitioner.

(b) The Commission itself filed the accusation against petitioner.

(c) The Commission was the prosecutor of the charges against petitioner.

(d) The Commission was the adjudicator of all questions of evidence, fact and law at the hearing on the merits of the charges against petitioner.'" (B 32)

The Supreme Court of Florida thereafter entered its opinion, dated June 17, 1970. (A 13-40) The majority opinion of the Supreme Court of Florida (representing the view of four of the justices) approved and accepted the recommendations of the Commission except for the suggested restriction of Judge Kelly to Pasco County. The majority of the Supreme Court held that Judge Kelly had engaged in conduct unbecoming a member of the judiciary and publicly reprimanded Judge Kelly for such conduct. In issuing its reprimand, the majority of the Court stated (A 22):

"The reprimand does not amount to an acquittal, nor does it have the elements of a final judgment necessary to invoke the principles of res judicata."

The majority of the Court indicated that the entire record of the inquiry might be introduced into evidence in any subsequent inquiry brought before the Commission concerning Judge Kelly. (A 40) The majority of the Court specifically rejected the free speech and due process points raised on behalf of Judge Kelly. (A 18-20, 22-23)

Three members of the Florida Supreme Court dissented from the majority opinion. Chief Justice Richard W. Ervin wrote a dissenting opinion in which two associate justices concurred. The dissenting opinion recognizes primarily that the action of the Commission and the public reprimand by the majority of the Supreme Court of Florida impinge upon Judge Kelly's right to freedom of speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. Chief Justice Ervin stated (A 36):

> "If the First Amendment does not protect a Judge's right to speak in circumstances such as these, then we are bound to have in Florida a timorous lot of judges lacking independence, afraid of their judicial shadows and fearful to exercise concientiously the right to speak out in favor of judicial reform."

Judge Kelly filed a timely Petition for Rehearing addressed to the majority opinion of the Supreme Court of Florida and there once more raised the question of Judge Kelly's constitutionally protected rights to freedom of speech. (B 35-43) The Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

I

The public reprimand of Petitioner by the Supreme Court of Florida for publication of a Petition criticizing the administration of the courts in his judicial circuit conflicts with free speech principles enunciated in previous decisions of this Court.

The charges against Judge Kelly which constituted the "conduct unbecoming a member of the judiciary", according to the Commission, included (1) failing to cooperate with other circuit judges, (2) attempting to seek alleged change in court procedures in a manner contrary to certain canons of judicial ethics, (3) seeking publicity with the intent to embarrass other judges by filing a Petition with the Clerk of the Circuit Court, (4) using the office of Circuit Judge for the purpose of advancing personal ambitions and publicity to the detriment or embarrassment of fellow judges and (5) conduct leading to the disrespect for, and the lowering of, the image of the Court. (B 2-4) Review of the full report of the Commission together with the opinion of the Supreme Court of Florida indicates quite clearly that the *sine qua non* of the charges against Judge Kelly was his filing, with the Clerk of the Circuit Court, the Petition criticizing the administration of the courts in his circuit and recommending reforms believed by Judge Kelly to be in the best interest of the Circuit and the people. The majority opinion of the Supreme Court of Florida recognizes this fact by stating (A 27):

> "The crucial question is whether the activities of Petitioner [Judge Kelly] were for the purpose of effecting court reform or for the purpose of securing personal notoriety and furthering a career in politics."

The "activities" referred to by the majority of the Supreme Court relate exclusively to Judge Kelly's Petition.

In an attempt to avoid the unconstitutional consequences of its decision, the majority of the Supreme Court ostensibly denounced Judge Kelly's motive[6] and

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[6] Judge Kelly's motive in filing his Petition is most graphically illustrated by his testimony before the Commission as follows (Transcript of Proceedings before Florida Judicial Qualifications Commission, held March 13, 1980, pages 1432-1433):

Q Was it your dedication that sort of forced you to do this?

A The answer to that sounds somewhat self-serving. But I think it was my dedication, and it was dedication to this type of situation: When these people are in the County Jail over there, and I know that there is a popular sentiment across the country to be hard on crime, but the facts of life are that virtually all of the people that are in that County Jail right now will be either turned loose without being prosecuted, they will be prosecuted and released on probation, or they will serve a very short term and be released either from the County Jail or from a penitentiary. Then these people are going to go forth, and we have got to live with them. The way they are treated there I think is important and vital. Now, for those people that are going to be released without prosecution, and I have records here to show that the number is very substantial, or if they are placed on probation, you are going to find that virtually all of these people are poor, hard-poor people. Now, if you turn them loose on probation 90 days or 120 days or six months after they have been charged, then they have lost their car and their refrigerator, and they are in debt with the finance company and paying horrendous interest rates, and they have lost their wife and family, and their life is in an absolute utter chaos. They are poor, uneducated, and poorly trained. And we put them out and say live in society in peace. This is a very difficult situation. So as far as I am concerned I am uneasy and chafed and prodded by every day they stay there when they shouldn't be there. If we are going to put them on probation, then let's find out and get the job done. And this hurts me and it bothers me. And I don't mind paying this price to accomplish that.

methods rather than his right to criticize. (A 21) However, the curtailment of Judge Kelly's freedom of speech is no less severe simply because this result is achieved through indirection.

The Commission and the majority of the Supreme Court of Florida have disciplined Judge Kelly by publicly reprimanding him for his criticism of the courts and they have publicly warned Judge Kelly that he may be removed from office if he persists in his criticism. The disciplinary measures taken by the Commission and the majority of the Supreme Court are clearly inconsistent with the principle established by this Court that public criticism of the courts must create a clear and present danger of disrupting the administration of justice for punishment of the critic to be constitutionally permitted. See *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed. 2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1946); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1945); *Bridges v. California*, 314 U.S. 252 62 S.Ct. 190, 86 L.Ed. 192 (1941) Cf. *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964). Embarrassment of other judges, as allegedly resulted from Judge Kelly's criticism, is certainly not such a disruption of the administration of justice which would warrant the infringement of Judge Kelly's right to criticize.

Judge Kelly is a public official twice elected by the voters in his circuit. In his Petition directed to the other judges of his circuit, Judge Kelly recognized that:

> "The substance of our judicial responsibility is to dispense justice according to law and provide an efficient court that is responsive to the public's need." (A 2)

Each and every one of the proposals set forth by Judge Kelly in his Petition is designed to promote more efficient and effective administration of the courts. It is not merely the right of a public official to espouse such changes but indeed it is his duty. The public's right to know and receive information is an integral part of the freedom of speech that Judge Kelly is here seeking to protect. Cf., *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968).

This Court has held that the right of a public official to criticize is no less constitutionally protected because of his official capacity. See *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968); *Puentes v. Board of Education*, 392 U.S. 653, 88A S.Ct. 2271 (1968). Significantly, in *Pickering v. Board of Education, supra*, this Court recognized that teachers, as a class, are the members of a community most likely to have informed and definite opinions as to the administration and operation of the schools and that, accordingly, "it is essential that they be able to speak out freely on such questions without fear of retalitory dismissal." (391 U.S. at 572) In the same way, judges, as a class, are the members of a community most likely to have informed and definite opinions as to the

administration and operation of the courts. Therefore, it is just as essential that they be able to speak out freely on such questions without fear of public reprimand or retalintory dismissal.[7]

According to the majority of the Supreme Court of Florida, Judge Kelly and members of the judiciary in general are constantly "enmeshed in the conflict between candor and responsibility—maintaining the candor of the politician without shirking the responsibilities of a judge." (A 27) Further, the majority of the Supreme Court of Florida found as follows:

> "The candor of Petitioner [Judge Kelly] as a politician resulted in a large group of dedicated followers, but, in the final analysis, his candor as a politician caused him to shirk his responsibilities as a member of the judiciary." (A 28)

Thus, Judge Kelley stands accused, convicted and censured for being candid, for speaking out, for refusing to be timid.

It is in this context that we respectfully recall to this Honorable Court a recent statement delivered at the annual meeting of the American Bar Association in St. Louis, Missouri, on October 10, 1970. In discussing certain problems with the federal judicial system, Mr. Chief Justice Warren E. Burger stated:

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[7] The fact that Judge Kelly has not yet been removed from office but has, at this point, only been reprimanded and warned does not make the protection of the First and Fourteenth Amendments premature. Because the threat of sanctions may deter almost as potently as the actual application of sanctions, this Court has treated a threatened loss of public employment as if it were actual. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed. 2d 321 (1965).

> "The price we are paying and will pay is partly because judges heve been too timid and the bar has been too apathetic to make clear to the public and the Congress the needs of the courts. I intend to be neither timid nor apathetic about this." U.S. News and World Report, August 24, 1970, page 70.

Timidity and apathy are especially costly in this regard in Florida because the judges are elected and the franchise of the individual is valueless unless he has free access to information concerning the Courts. Recognizing this Judge Kelly has been neither timid nor apathetic.[a] It

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[a] Judge Kelly's sense of duty in this regard is revelaed during his cross-examination by one of the members of the Commission (Transcript of Proceedings before Florida Judicial Qualifications Commission, held March 13, 1969, pages 1438-1441):

Q In connection with this, do you think that you can go along with these rules, whatever they might be, and recognize the fact that in this country of ours we must, if the courts are going to operate, we have got to accept the rule of the majority?

A Yes, Judge Moody, I understand that. But there are some very difficult problems in this. And just to say yes to that I think doesn't countenance all these problems. For instance, in the final analysis *the public has to make some decisions in this thing, and if they don't know what the issues are they can't intelligently exercise a franchise.* And then we get into this question about image. I know that this is bad news for me to say that. But I can't believe that telling the truth is going to be harmful in the end to what I want to serve. And that is this: This conversation about the image of the court is inconsistent with what I believe is appropriate. The reality of the court. (Emphasis added)

Q I believe you are getting away from the question that I asked you.

A Well, Judge Moody, what I was trying to aim at is this. You asked should a majority rule. Yes, I believe that. And I think that if your question was should the majority of the Judges rule within the Circuits, yes, I think that they should. But I did not want, in order to curry favor with you, to be unfair or deceitful about it.

is this very circumstance which cries out for this Court to reaffirm the free speech principles enunciated in the decisions mentioned hereinabove by issuing a Writ of

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Q I don't want you to curry favor. I am trying to get at your basic concepts.

A I wasn't suggesting you did.

Q It is a problem. We live under the law. We must. We must abide by the law. We must abide by our rules.

A Yes.

Q We can't change the law by violent means.
A Yes, sir.

Q We should change the law in the recognized method of changing the law.

A Yes.

Q We, as Judges, have that primary obligation, and it is under that thought I was asking whether or not you felt that you could comply with the rules and try to change them in an orderly manner if you disagree with them, and under the prescribed manner of change, rather than a manner that shall we say would be in violation of the Canons of Ethics.

A Judge Moody, let me say this. I have no business violating the Canons of Ethics. There is no justification for that. And I have no refuge from the law if I do. There is no question about that. And I recognize the validity of that and the responsibility. But I am not real sure that there is anything well defined which says that for a Judge to file with the clerk of his court what he thinks a problem is and the solution for it when you consider this. In your Circuit you have a dismissal procedure and it has been in existence I think for ten years or more than 15 years, I don't know, but I know for a long time. In my Circuit when I came here we had no rules. There were more than 9,000 cases in Pinellas County. There were 2,000 cases pending in this County. And yet the clerk was representing to the public that there were only 300 pending. There 135 appeals pending. Fifty-two of them had been pending more than 20 years. Now, I think these are vital things, and vital to the public. And the issue is this: If an individual Judge tries to unilaterally try to do something about this in a conservative way after long

Certiorari to the Supreme Court of Florida so that judges all over the United States, as well as Judge Kelly, will be protected in their right and duty to inform the public regarding the needs of the Courts and so that the public's right to receive informed information will remain unfettered.

II

The combination of the Commission's functions as investigator, grand jury, prosecutor, and judge and jury of facts and law directly conflicts with procedural due process principles previously established by this Court.

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urgings to his brothers, if the question is must he then simply capitulate and let it go on and draw his salary, it is a hard question for me. It is very difficult for me as an individual — now, I don't file petitions every day. I have been on the Bench for more than eight years and I filed three petitions. I think they were all justified. And I have tried to rectify these things. And I think this is good for the Judges. I think that it serves the image of the court that I want to serve, and I am not trying to cause trouble. But I am concerned about these matters.

Q Well, don't misunderstand me, Judge Kelly. I think we all are concerned from time to time. As a matter of fact, I have a matter before me right now involving the situation where the State, at the request of the U. S. District Attorney's office, has granted blanket immunity to criminals. I think it is wrong. It is a matter that I know as a Judge I have to handle in a certain manner, and I can't run to the press with it. But we have obligations, as I see it, as Judges, do we not, to comply with our rules and handle them in a manner that is recognized, a recognized custom and recognized by the rules, in trying to handle the matter in the best interests of everyone?

A Yes, sir. And there can't be any question about that. But, when individual constitutional rights are being violated every day, every day in this Circuit, I can't help but feel it is important to do something about it. I think that I should be punished. There is no question about that. But I should be punished for the things that I have not done in the years that I have let go by and not doing them more than for filing this Petition.

Although Article V, Section 17A(3) of the Florida Constitution provides that the Commission may request the appointment of special referees "to hear and to take evidence . . . and to report thereon to the Commission," in the instant case the Commission chose to perform this function itself. (B 45) Thus, it was the Commission which decided to, and did, investigate the conduct of Judge Kelly. It was the Commission which then filed formal charges against Judge Kelly. It was the Commission, through its designated counsel, which prosecuted Judge Kelly. It was the Commission which heard and took evidence relative to these charges. It was the Commission which then made findings of fact, conclusions and recommendations to the Supreme Court of Florida. It was the Commission, again through its designated counsel, which briefed and argued facts and law allegedly in support of its position before the Supreme Court of Florida. And, presumably, it will be the Commission again, through its designated counsel, which will before this Court, attempt to uphold the decision of the majority of the Supreme Court of Florida.

In *In re Murchinson*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), this Court indicated that a mixing of functions of grand jury and judge is a denial of due process. This Court condemned a procedure under which a single judge acted first as a grand jury and then tried the criminal contempt proceedings arising out of his investigation as grand jury. This Court stated:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigation." (349 U.S. at 137, 75 S. St. at 625)

Also in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 9 L.Ed. 616 (1950), this Court, addressing itself to the purposes for enactment of the Federal Administrative Procedure Act, stated (339 U.S. at 41, 94 L.Ed. at 625):

> "More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."

See also *American Cynamid Company* v. *F.T.C.* 363 F.2d 757 (6th Cir. 1966); *Amos Treat and Company, Inc.* v. *Securities Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962); *Mack* v. *Florida State Board of Dentistry*, 396 F.Supp. 1959 (S.D. Fla. 1969).

The due process prohibition against mixing of functions should apply to the instant proceedings. This Court has held that requirements of procedural due process must be met in disbarment proceedings, which are quasi-criminal in nature. See *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *Spevack* v. *Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). These proceedings, which can lead to removal of a judge from office, are no less "penal" than disbarment proceedings.

The natural compulsion upon the Commission to justify its finding of probable cause for holding hearings and the natural inclination of the Commission to be persuaded by its designated counsel have necessarily prevented impartial findings, conclusions and recommendations on the part of the Commission. Although

it is true that the Commission can only recommend and the Supreme Court of Florida is not bound by any of the recommendations of the Commission, the Supreme Court of Florida does not take additional evidence and the majority opinion of the Supreme Court itself recognizes the significance of the Commission's recommendations. The majority opinion states (A 23-24):

> "While the power to render the ultimate judgment in these cases is vested in this Court, the findings and recommendations of the Florida Judicial Qualifications Commission are entitled to receive due consideration and are of persuasive force. . . . In view of these constitutional provisions prescribing the composition of the Commission, its findings should be given great weight."

We would respectfully submit that giving great weight to the findings and recommendations of the Commission in the instant case results in a denial of due process to Judge Kelly.

CONCLUSION

The development of modern machinery for inquiring into judicial conduct is a vital part of our contemporary legal history. Errant judicial conduct should be dealt with promptly. Yet, whatever system is used, judges must receive the same basic fairness expected of them. Instrumentalities such as the Florida Judicial Qualifications Commission may be a wholesome concept. But they must not be allowed to assume the role of censors or to stifle constructive criticism of judicial administration. It is timely and urgent that this Court furnish its guidance with regard to the critical constitutional aspects of these developments.

Judge Kelly sought to inform the public of his views on the need for reform and change in judicial administration in Florida's Sixth Judicial Circuit. He did so through the filing of a public document which was thoughful and respectful and which constituted a heartfelt act of conscience by a judge in the performance of his duty. Without hesitation, we urge this Court to read that document (Appendix "A", pages 1-12) in its entirety with a view to determining whether such public comment may constitutionally serve as the basis for adverse disciplinary action against a judge; or whether the sanctions imposed here may constitutionally stand as a muzzle against similar public comment by judges in Florida or any other state.

We submit that the vital needs of a free society, where the free flow of information from informed sources is imperative, cannot accommodate the stifling effect of the opinion sought to be reviewed.

For these reasons, a writ of certiorari should issue to review the action and opinion of the majority of the Supreme Court of Florida.

Respectfully submitted,

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APPENDIX "A"

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF FLORIDA

PETITION TO THE JUDGES OF THE SIXTH JUDICIAL CIRCUIT

Comes now the undersigned as Judge of the Sixth Judicial Circuit and submits to his fellow judges for their approval a set of administrative reforms for the purpose of causing this Court to render a more efficient and direct service to the public.

On the 26th day of March, 1968, the Petitioner resigned as Presiding Judge of this circuit. Such an event deserves more explanation than was contained in the written resignation. The need for administration of the business of this circuit is urgent and this aspect of the Court's responsibility has been largely neglected. Your Petitioner has consistently and conservatively urged this view. The reforms presented by this Petitioner have always been sought in the privacy of judicial conferences and individual discussions with the judges of this circuit. Precipitous action by this Petitioner in bringing about the accomplished reforms has occurred only when it was made apparent that the alternatives were unilateral action or abandonment of a cause necessary in the interest of the Court and the public we serve.

It is not intended that a rehash of past debates be had in this text but it is clear that reference to these matters is necessary in order that the present situation be made clear.

Attached is a petition filed the 7th day of September, 1962, a consideration of which is pertinent to present understanding. (Exhibit A)

This reference clearly indicates that what has been suggested by this Petitioner has in the past proven to be reasonable, conservative and in the best interest of this Court and eventually adopted. This establishes that

the present response is not new but is old. It became apparent that this Petitioner as Presiding Judge was faced with a need for expending considerable energy to maintain his position as Presiding Judge which is really irrelevant. The substance of our judicial responsibility is to dispense justice according to law and provide an efficient court that is responsive to the public's need. Who is Presiding Judge is unimportant.

Nothing that is said here should indicate that this Petitioner is the only Judge in the circuit that is concerned with the present condition and direction of the courts in Pinellas County. This very presentation is an expression of confidence that even the most militant objector can be stimulated to share this concern. Some of the judges presently agree that changes should be made but not necessarily in complete agreement with the proposals here made.

Basically the objection to any kind of administrative improvement has been found primarily with the concern that change constitutes a criticism of those who have not acted in the past and have failed to make improvements in the present and that any change is an indictment of their inertia. This is unfortunately negative and unwarranted because such a result is more than compensated for by the positive appreciation for present accomplishment. The public is logically entitled to hope for evolution and progress in every governmental function.

The judges of this circuit know all or most of what is here to be suggested. The conditions, however, cause a need for a record and the responsibility fixed.

A comparison of the cases completed and disposed of in Pinellas County with Pasco County, the other county in the circuit, and with Hillsborough County which constitutes the Thirteenth Judicial Circuit and is well suited for comparison, reveals that from 1963 through 1966' the production of the court in Pinellas County and

the Sixth Circuit in terms of work completed was substantially less for every year of comparison than the work accomplished in Hillsborough County. (See attached Exhibit B)

A comparison of the work load and condition of the Circuit Court in Pinellas and Pasco County[2] shows that Pinellas has a case load ten times greater than Pasco County. It has eleven times as many judges and thirty times as many cases pending. It is also significant to note that at the beginning of 1967, Pinellas County had 7,110 cases pending before its Circuit Court and that at the close of the year there were 7,454 cases, which shows a trend in the wrong direction.[3] While in Pasco County at the beginning of 1967, there were 303 cases pending before the Circuit Court and at the close of the year there were 273 cases, which shows a change of ten per cent in the right direction.[4]

The records[5] show that for the year 1967 the Circuit Judges of Pinellas County assigned twenty-five per cent of the cases disposed of to general masters causing an additional and unnecessary annual cost to the litigants of $24,060.00. Besides the additional cost, this procedure imposes a seven to ten day delay in the disposition of the case compared to a procedure where a judge tends to the case himself. These cases being heard by the judges could and should result in additional savings of thousands of dollars in unnecessary transcription and court reporter fees. This suggestion will not be popular because it will interfere with a source of income of the court reporters of this circuit; however, this is a much more acceptable alternative than make work inefficiency.

In August of 1965 there were 139 prisoners being held in the Pinellas County jail awaiting action by the Circuit Court. Attention was focused on this situation by the Petitioner in September of 1965, and by September of 1966 this number had been reduced to 52. A year later the number had risen to 93 and by March of 1968,

the number of prisoners awaiting action by the Circuit Court had increased to 123. It is apparent that with the increase in the county's population, the crime rate and the efficiency of law enforcement that the number of people waiting in jail for action by the Court would naturally increase. It is submitted, however, that the phenomenal increase from September, 1966, to March, 1968, is more evidence of need for administrative change than an alarming increase in the crime rate.

The tremendous reduction in the number of prisoners between September, 1965, and September, 1966, is an excellent case in point for the purpose of showing the gross lack of administration of the Circuit Court in Pinellas County and the serious consequences of a poorly administered court. The change was accomplished with the simple expediency of appointing the Public Defender at an early date, and yet to bring this simple administrative change into effect resulted unreasonably in crisis, controversy and ill-will among the judges which varied only in degree from the same response that has met every other suggestion to improve administration.

Soon after the undersigned took office in 1961, he started urging that the procedure for expediting criminal cases, especially cases in which the defendant was being held in jail, be reviewed. Years went by and nothing was done in Pinellas County; then in 1965, your Petitioner went to the then Criminal Administrator for Pinellas County and requested the reform and argued its urgency. The rejection was unqualified. During the same time a grand jury was convened in Clearwater, empaneled by the Criminal Administrator and although it is the duty of a judge presiding over a grand jury to instruct the grand jurors on their duties,[6] no instruction was given regarding Section 905.16[7] of the Florida Statutes. (See Exhibit C) This provision in the law makes it the duty of the grand jury to inquire into every case in which a citizen is being held and against whom no indictment or information (formal charge) has been filed, the purpose being to use the grand jury for protecting

citizens from being held for extended periods of time without prompt prosecution and to avoid the very situation that existed in the Pinellas County jails.

As a result this Petitioner arranged for a conference of the judges of the circuit at which he reminded the judges of his long standing requests that something be done, presented a transcript of the Criminal Administrator's charge to the jury, and a jail list prepared by the Sheriff of Pinellas County. The response was *controversy*, personal attacks and the Petitioner reminded that he was a trouble maker. In spite of this your Petitioner made the proposition to his fellow judges that either they were going to take action "now" or the Petitioner would "empanel a grand jury and sit in Clearwater with the grand jury until the jail is as clean as a hound's tooth as the letter and spirit of the law requires." This resulted in the Criminal Administrator resigning with a statement that if he could not "run the job my way I won't run it." This Petitioner personally urged him not to resign saying," the responsibility belongs to all of us, we just need to make some changes." The change was effected and within one year the number of prisoners in the Pinellas County jail awaiting action by the Circuit Court was greatly reduced. This is another good example of a typical episode in the Sixth Judicial Circuit and it goes a long way to explain the present condition.

This reform was necessary to guarantee the protection afforded the public by the Constitution but it was also necessitated by the fact that a new jail just constructed at a tremendous public expense was already overcrowded and great sums of public money were being wasted.

Virtually every phase of the criminal administration at the present time is burdened with inefficiency. An excellent example of this is the large number of persons held in custody being transported to the various Justice of the Peace Courts in St. Petersburg, Tarpon

Springs, and other areas of the county from the county jail in Clearwater for the purpose of an insolvency hearing then transported back to the county jail to be returned at a later date for a preliminary hearing, all of this at a gross and unnecessary expense to the taxpayers and at unnecessary risk to the guards charged with the responsibility of this unwarranted prisoner transportation.

The county prisoners most often are in the county jail in Clearwater at one end of a passageway which runs from the county jail to the courthouse with several Circuit Judges at the other end. This passageway is grated with heavy fencing at a great public expense for security purposes. All that would be required would be for the prisoners to be taken through this passageway to a Circuit Judge so lawyers could be appointed for those who qualify. This would result in the prisoner making one trip in most instances to the Justice of the Peace Court instead of two or three trips. This simple effort would save thousands of dollars a year. This suggestion is not a criticism of the Justices of the Peace but deals with the lack of sensitivity on the part of the Circuit Court to the needs of administration in expediting the business of the courts efficiently and economically.

The records of the Circuit Court for Pinellas County show that six judges scheduled 38 cases for trial during the week of October 9, 1967. If these same trials had been scheduled before only three judges, the 38 cases could have been tried with four court days to spare. Scheduling these cases before the six judges required six courtrooms, six or more bailiffs, six deputy clerks, six court reporters, six jury panels or time consuming and confusing panel sharing, and the scheduling of the time of six judges while one-half of this force could have done the same work in the same time with four days to spare. (See Exhibit D)

This same comparison for the whole month of October shows that nineteen trial weeks were scheduled

while only nine were required with the result that hundreds of hours of judges time and thousands of taxpayers dollars were wasted. These same comparisons for the last quarter of 1967 and the first two months of 1968 reveal that 1,360 hours of judges time was largely lost along with gross waste of jurors time and the time of clerks, bailiffs, court reporters and public money.

During the time that this writer served as Presiding Judge it was quite apparent that all of the Pinellas County officials that would be involved in necessary court reforms, including the State Attorney, the Public Defender, the Sheriff and other law enforcement officials, the Clerk of the Court, and the Board of County Commissioners for Pinellas County were eager to bring more efficient administration to the Circuit Court for Pinellas County. Their cooperation was responsive and real and greatly appreciated. The previous lack of communication was manifest in every procedure and regard and is evidence of inattention on the part of the judges upon whom the other officials necessarily look for leadership.

The Board of County Commissioners for Pinellas County has expressed its concern about the mounting cost of operating the courts. This concern is justified and applauded. Every dollar added to the cost of litigation whether paid directly by the litigants or the taxpayers is a negative in determining the efficiency of our trial court system.

Vast and important and much needed judicial reforms await only the interest and action by the judges of this circuit.

It is not intended that this petition constitute an in depth study or report on reorganizing and reforming this circuit. It is intended to bring attention to the glaring problems and demonstrate obvious solutions. The detection of more need and the suggestion of more clever remedy is readily available if this prod creates concern and action.

Good administration will result in better courts run for less giving better service and leave the judges with free time to take up additional tasks and further lessen the tax burden.

Efficient administration in this circuit is clearly going to mean that the judges will not have enough work to do and more jurisdiction is required in order to more effectively utilize their time. The Civil and Criminal Court of Record in Pinellas County is continuing to grow. It started with one judge, it now has two and in the normal course it will soon grow to three. In good conscience, the circuit judges can not avoid taking this additional jurisdiction enabling the Civil and Criminal Court of Record to be abolished and the cost of that court which amounts to thousands of dollars to be saved. An orderly and efficient acquisition of the Civil and Criminal Court of Record jurisdiction would demand that the two present Court of Record judges be made Circuit Judges at the time of the transition. This would assure a smooth transfer by causing two extremely experienced and qualified judges familiar with the cases and calendar to be present to assist in the task.

It can be anticipated that under the present population criteria provided in the Constitution, one new judge will be added in this circuit each year. Taking the two Court of Record judges would mean that another Circuit Judge would not be added until the population had sufficiently increased to justify the addition of these two Court of Record Judges.

Such a plan would contemplate that at the present time the number of judges handling the entire jurisdiction of both courts would not increase and that two years hence when under the present situation two additional Circuit Judges could be added they would *not* be added and this suggestion would pay tremendous dividends to the taxpayers and be a source of accomplishment and pride for every judge in this circuit.

This matter has been discussed with the Court of Record Judges and they believe that the suggestion appears to be sound and are eager to consider the matter further with the judges of this circuit. This suggestion is further recommended by the fact that it would cause the jurisdiction of this court in Pasco and Pinellas to be more uniform.

At the present time the judge acting as Criminal Administrator has a secretary working with him in that capacity and a few doors down the hall has another secretary tending to his other judicial tasks at a salary of $5,000.00. No one familiar with the operation of a judge's office or the duties of his secretary would contend that a Circuit Judge needs two secretaries.

The individual judges should impose additionally upon their secretaries in handling the administration and disposition of criminal cases and thus avoid the luxury of a secretary to the Criminal Administrator or Presiding Judge. Many of the tasks heretofore performed by such person being specified in the Statute as the duty of officials which currently have adequate personnel to handle these matters without additional expenditure. Specific reference is had to such matter as the notification to the bondsmen and the parents of minor defendants. (Section 903.26 and 932.38, Florida Statutes)

We, as Circuit Judges, share an awesome responsibility. This Petitioner has resigned a position he coveted to remove any possibility of personality and vanity as a consideration in the discharging of this obligation. In return it is only requested that these suggestions be considered on their merits and adopted or be substituted for by better plans.

In this vein, the following recommendations are humbly and respectfully submitted in the hope that they will be an improvement or will stimulate thought bringing forth better suggestions.

A. That no more than three judges be assigned for the trial of civil and criminal cases in Pinellas County on any given week until such time as a need for more is shown to exist.

The mechanics of this suggestion may be demonstrated by assuming that there was a need for the trial of civil and criminal cases in a given week in Clearwater and a need for the trial of civil cases in St. Petersburg. All St. Petersburg cases would be assigned to one judge sitting there. All civil cases in Clearwater would be assigned to one judge at that location and all criminal cases assigned to the third judge in Clearwater, all cases to be scheduled on Monday morning. Each judge upon completing the cases scheduled before him would then have an obligation to assist the other judges with the result that each judge would be totally occupied with the trial of cases until all of the cases scheduled for trial that week had been completed.

This suggestion further contemplates that in many weeks the services of only one judge or possibly two would be required to handle all trials, civil or criminal, leaving the other ten or eleven judges free to dispose of and schedule full calendars with ample notice on matters not requiring a jury.

B. That all cases in the Circuit Court be heard by the judges of that court unless there is some particular need suggesting the referral of the cases to a special or general master for hearing. To this end any judge feeling that the burden of his calendar or the cases assigned to him will cause undue delay make this fact known to the Presiding Judge and assistance from the other judges be brought to bear rather than passing the case from the attention of the judges to a hearing before a general or special master at the expense of unnecessary delay and cost to the litigants.

C. That the Public Defender be appointed by the Circuit Judges as a daily routine for all indigent persons qualifying under the law for the services of that office.

D. That pre-sentence investigations be requested of

the probation office by the circuit judge handling the case or the Presiding Judge with the consent of the Defendant in all instances as soon as the Public Defender is aware that his client intends to plead guilty and not wait until an information or indictment is filed and the Defendant arraigned.

E. That the State Attorney be worked with and encouraged by the judges to expedite the disposition of every criminal case, attacking the problem on a step by step basis from the time of arrest until the Defendant is released at liberty or to other authorities, including but not limited to the use of Section 909.14 of the Florida Statutes.

F. That the Public Defender be encouraged and cooperated with in order to permit him to commence at the earliest possible time to develop the information that will enable advice to be given to his client on a plea and to avoid delaying the commencement of this process until an information or indictment has been filed.

G. That the Court, the State Attorney, the Public Defender and representatives of the Bar make a concerted effort to avoid last minute pleas of guilty in cases scheduled for trial.

Suggestions D, E, F and G are directly dependent upon the Circuit Judges providing the communication and coordination. These are especially fertile areas.

H. That the job of secretary to the Criminal Administrator be eliminated.

I. That all orders providing for the payment from public funds for testimony and trial transcripts be limited in amount to that provided by Chapter 29, Florida Statute, and if the law in this regard is inadequate that the Court urge its change upon the legislature when it next convenes.

J. That the Civil and Criminal Court of Record be abolished and the jurisdiction assumed by this Court.

DATED this 3rd day of April, 1968.

Respectfully submitted
RICHARD KELLY
Circuit Judge

FOOTNOTES

[1] As shown by the annual report of the Judicial Council of Florida

[2] Statistical return filed by the Clerk of the Circuit Court in the respective counties to the Judicial Council of Florida for 1967

[3] Statistical return filed by the Clerk of the Circuit Court of Pinellas County to the Judicial Council of Florida for 1967

[4] Statistical return filed by the Clerk of the Circuit Court of Pasco County to the Judicial Council of Florida for 1967

[5] The report referred to in footnote 3 and data furnished by the three general masters for Pinellas County, showing the Honorable George L. Brown, Jr. (465), the Honorable Edwin B. Ellis (585) and the Honorable Richard A. Eagle (554)

[6] Section 905.11, Florida Statutes: CHARGE OF COURT
After the grand jurors are sworn the court shall charge them concerning their *duties*. (emphasis supplied)

[7] 905.16 *DUTIES* OF GRAND JURORS
The grand jurors shall inquire into every offense triable within the county for which any person has been held to answer, if an indictment has not been found or an information filed for such offense, and all other indictable offenses triable within the county which are presented to them by the prosecuting attorney or otherwise come to their knowledge. (emphasis supplied)

EXHIBITS *

A. Petition filed with Clerk of the Circuit Court, Clearwater, September 7, 1962.

B. Comparison chart for Pasco, Pinellas and Hillsborough.

C. Transcript of proceedings before Circuit Court, Clearwater, on the 30th day of August, 1965.

D. Chart showing trial schedules for last quarter of 1967 and first two months of 1968.

* **The Exhibits to Judge Kelly's Petition are set forth in the separately bound Appendix "B" filed herewith at pages 53 through 90**

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1970

INQUIRY CONCERNING A
JUDGE NO. 1
Richard A. Kelly, Circuit Judge : CASE NO. 38,595

Opinion filed June 17, 1970
Case of original jurisdiction—Report from The Florida Judicial Qualifications Commission

Masterson, Lloyd, Sundberg & Rogers and Fowler, White, Collins, Gillen, Humkey & Trenam, for Petitioner

William D. Hopkins and F. E. Steinmeyer, III, for Respondent

Joseph F. McDermott, as Amicus Curiae Committee for Judge Kelly

ADKINS, J.

We have for consideration a petition to reject the recommendations, findings and conclusions of the Florida Judicial Qualifications Commission in its first proceeding. Rule 24(a), Florida Judicial Qualifications Commission Rules (F.J.Q.C.R.). The Commission found petitioner Judge Richard A. Kelly of Dade City, Florida, guilty of certain conduct unbecoming a member of the judiciary.

Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved

by evidence of an accumulation of small and ostensibly innocuous incidents which, when considered together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary. The record in this case clearly reflects a pattern of petitioner's hostility toward many attorneys, court officials, and fellow judges, as well as a concerted effort to pamper the public and news media by press releases designed to bolster his personal image at the expense of the judiciary. This is conduct unbecoming a member of the judiciary.

Petitioner is a judge of the Sixth Judicial Circuit of the State of Florida and a resident of Pasco County. He was first elected a circuit judge in November 1960, and was re-elected to that office in the general election of November 1966.

Petitioner was the subject of impeachment proceedings before the Florida Legislature in 1963, and was acquitted.

On February 13, 1968, petitioner was elected Presiding Judge of the Sixth Judicial Circuit. He immediately demanded that various changes in the method by which criminal prosecutions were handled in the circuit, ordered one of the newly-appointed judges to duty in Pasco County for ninety days even though this judge resided in St. Petersburg, Pinellas County (this order was rescinded), indicated that he was going to transfer all domestic relations cases to one particular judge of the circuit, proposed the elimination of special masters in uncontested divorce cases, ordered the official court reporter to report all Justice of the Peace hearings upon call of the Public Defender of Pinellas County. Although some of petitioner's proposals may have been appropriate, the Commission found that they were presented in such a manner as to create turmoil, confusion and chaos within the circuit. As a result, a majority of the other judges of the circuit determined to remove or recall him as presiding judge in March of 1968. He was notified of the determination of the majority on March 19, 1968.

Judge Kelly first requested the judges to refrain from removing him or recalling him, assuring them he would return to Pasco County and not interfere with the administration of the court in Pinellas County if they would let him remain as presiding judge. When this offer was not accepted by the other judges, he requested and was granted a week's reprieve in order that he might tender his resignation as presiding judge.

After this delay, a majority of the circuit judges again met with Judge Kelly to consider his recall as presiding judge. At this meeting Judge Kelly polled all of the judges and determined that they still intended to remove him as presiding judge. He then announced his resignation; but threatened those in attendance that they would regret their actions and that he would cause them embarrassment.

Several days later he arranged an appointment with the editor and several reporters of a local newspaper in St. Petersburg to enlighten them about a petition he intended to file proposing certain alleged judicial reforms. Subsequently, on April 5, 1968, he filed with the Clerk of the Circuit Court what was styled "Petition to the Judges of the Sixth Judicial Circuit in the Circuit Court of Pinellas County." His fellow judges were not given an opportunity to see or examine the contents of the petition although it contained suggested court reforms and criticism of court administration. As an example of petitioner's public criticism of his fellow judges, the petition stated:

> "The tremendous reduction in the number of prisoners between September, 1965, and September, 1966, is an excellent case in point for the purpose of showing the gross lack of administration of the Circuit Court in Pinellas County and the serious consequences of a poorly administered Court. The change was accomplished with the simple expediency of appointing the Public Defender at an early date, and yet to bring this simple administrative

change into effect resulted unreasonably in crisis, controversy and ill-will among the judges which varied only in degree from the same response that has met every other suggestion to improve administration.

"Soon after the undersigned took office in 1961, he started urging that the procedure for expediting criminal cases, especially cases in which the defendant was being held in jail, be reviewed. Years went by and nothing was done in Pinellas County; then in 1965, your Petitioner went to the then Criminal Administrator for Pinellas County and requested the reform and argued its urgency. The rejection was unqualified. During the same time a grand jury was convened in Clearwater, empaneled by the Criminal Administrator and although it is the duty of a judge presiding over a grand jury to instruct the grand jurors of their duties, no instruction was given regarding Section 905.16 of the Florida Statutes."

" . . .

"Virtually every phase of the criminal administration at the present time is burdened with inefficiency."

" . . .

"Vast and important and much needed judicial reforms await only the interest and action by the judges of this circuit."

" . . .

"The individual judges should impose additionally upon their secretaries in handling the administration and disposition of criminal cases and thus avoid the luxury of a secretary to the Criminal Administrator or Presiding Judge."

Apparently, for the purpose of seeking favorable publicity for himself, petitioner misrepresented the

facts in this petition regarding his removal as presiding judge when he said:

> "This Petitioner has resigned a position he coveted to remove any possibility of personality and vanity as a consideration in the discharging of this obligation."

The office of the Clerk of the Circuit Court is not a receptacle for the ex parte grievance petition of a politician, particularly when the object is to seek revenge by embarrassing public officials. Since we have a government of law and not of men, no member of the judiciary should act officially as a "judge" save only as it is found in and defined by the law. Petitioner knew judicial reform could be attained in a variety of ways "under the law," but vengeance could best be served through publicizing his grievance. This was accomplished when petitioner, in his official capacity as a judge, filed his ex parte petition with the clerk so that it would be a public record.

The evidence is replete with instances in which the judicial temperament of petitioner was lacking. Nineteen of the approximately twenty-one lawyers of Pasco County were willing to, and did, sign a petition for the impeachment of Judge Kelly; seven lawyers left Dade City in Pasco County because of Judge Kelly; many cases ordinarily filed in Pasco County were filed out of the county because of Judge Kelly; attorneys and court personnel were fearful of Judge Kelly; he was rude and inconsiderate of attorneys and court personnel. His erratic behavior culminated in the filing of the petition.

The filing of the petition by Judge Kelly came to the attention of the Florida Judicial Qualifications Commission and precipitated a preliminary investigation. This Commission was created under the provisions of Sec. 17A(2), *Fla. Const.*, Subsection (3) of which contains the following provisions:

> "Any justice or judge to whom this section applies may be disciplined by private reprimand or re-

moved from office for willful or persistent failure to perform his duties or habitual intemperance or conduct unbecoming a member of the judiciary or he may be involuntarily retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature. After such investigation as it deems necessary, the judicial qualifications commission may conduct a hearing concerning the removal, discipline or retirement of a justice or judge or request the supreme court to appoint three special referees, who shall be active or retired justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the commission. . . . If after hearing, or after considering the record and report of the referees, the commission finds good cause therefor, it shall recommend to the supreme court the removal, discipline or retirement of the justice or judge. The supreme court shall review the record of the proceedings on the law and facts and shall order removal, discipline or retirement, as it finds just proper, or wholly reject the commission's recommendation."

These constitutional provisions vest jurisdiction over the discipline of circuit judges in this Court and authorize it to exercise such jurisdiction through the Judicial Qualifications Commission. By the express provision of Section 17A(1), all justices or judges included within the constitutional provision are still liable to impeachment for any misdemeanor in office.

Petitioner complains that the proceedings before the Commission and its recommendations abridge his freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution and the Declaration of Rights of the Florida Constitution. He argues that he is being *punished* solely because his petition was published in the St. Petersburg Times and cites numerous decisions saying that the criticism of the judiciary must create a clear and present dan-

ger of disrupting the administration of justice before his utterances may be *punished*.

The proceeding before the Commission lacks the essential characteristics of a criminal prosecution. The object is not to inflict punishment, but to determine whether one who exercises judicial power is unfit to hold a judgeship. The Commission, created by the Constitution as an arm of this Court, is authorized to conduct a hearing for the purpose of aiding this Court in determining whether a judge is unfit or unsuitable. Under the provisions of the Constitution this Court may exclude from the judiciary those persons whose unfitness or unsuitability bears a rational relationship to his qualifications for a judgeship, so long as the adjudication of unfitness rests on constitutionally permissible standards and emerges from a proceeding which conforms to the minimum standards of due process. In short, the essence of the sanction imposed is not "punishment" but a reprimand based on grounds bearing rational relationship to the interest of the State in the fitness of its judicial personnel. See *Sharpe v. State ex rel. Oklahoma Bar Association*, 448 Pac. 2d 301 (Okla. 1968) cert. den., 394 U.S. 904, 89 Sup. Ct. 1011, where the Court discussed the applicability of the Sixth Amendment to the United States Constitution (Right to Jury Trial), in a proceeding before the trial division of the Court on the judiciary.

In these proceedings we are not faced with the question of petitioner's right of freedom of speech or with the contents of his pronouncements. The question is whether the motive of, and the methods used by, the petitioner together with the resulting turmoil created by his actions should be considered as conduct unbecoming a member of the judiciary and contrary to the Canons of Judicial Ethics.

Public understanding of the judicial processes can be obtained only through the use of responsible and informed news reporting. This understanding secures the

respect and obedience of the general populace so that the Court may effectively protect the rights of individuals as well as the rights of society. The public's access to information concerning the functions of various branches of government should not be limited and the public's right to know should be jealously guarded by the judiciary. The courts have never demanded favorable publicity.

There are many authorized methods of protest, dissent and criticism within the framework of the judiciary, such as the preparation of dissenting opinions, petitions to the Supreme Court for changes in the rules of procedure, submission of suggested changes to various committees of the Florida Bar, participating in the various legal seminars conducted by the Committee on Legal Education, or taking an active part in the state and local conferences of judges.

Criticism is not neutral. When a judge sets himself up to criticize other judges, his criticism ultimately must be viewed as having been constructive or destructive in its impact. If he has been temperate and judicious, his criticism is likely to be, in its ultimate result, beneficial to the community which he serves — and it does not matter whether this constructive criticism is publicly or privately voiced. On the other hand, impetuous argument, or criticism taken by methods which prevent honest discussion and a fair rebuttal can be expected only to have a destructive result. No matter how bland or even wholesome the content, if the methods used raise suspicion of motives among the judges, and renders the courts all suspect to the public, the result can only be an increase in disrespect for law and order, an increase in lawlessness, a greater tendency among some of our citizens to let loose their tendencies to disorder.

By the use of the power and prestige of his judicial position, the petitioner consistently sought favorable newspaper publicity in furtherance of his general

political ambition and in an effort to force his views upon his fellow judges. He cannot avoid the resulting inquiry as to his motive and methods by invoking the right of freedom of speech in this disciplinary proceeding. We are not concerned with his right to speak, but whether his motive or method does violence to the Canons of Judicial Ethics.

The petitioner complains that the Commission report wrongfully and unnecessarily includes comments as to the alleged mental disability or illness of petitioner even though he was acquitted of this charge. The initial charges contained the charge that "you have a disability seriously interfering with the performance of your duties."

After several days of testimony, much of which related to an alleged mental disability from which Judge Kelly may have been suffering, the Commission recessed the hearing and directed that an amendment to the formal charges be filed pursuant to Rule 15, F.J.Q.C.R., setting up the alleged mental disability. Pursuant to Rule 12B, F.J.Q.C.R., the Commission further directed that Judge Kelly submit to a psychiatric examination.

Judge Kelly declined to submit to an examination by the Commission-appointed psychiatrist and the Commission resumed its hearing. Because of his failure to submit to the psychiatric examination ordered by the Commission, Judge Kelly was not allowed to offer evidence of medical doctors as to his mental condition. This limited the record to lay testimony previously given as to his mental condition in accordance with general Florida authorities. See: 6 F.L.P., *Criminal Law*, § 467; 13 Fla. Jur., *Evidence*, § 329; *Redfearn, Wills and Administration in Florida*, 4th Ed. Vol. 1, § 4.18, p. 78, and § 10.23, p. 206; *Armstrong v. State*, 30 Fla. 170, 11 So. 618; *Norman v. State*, 156 So. 2d 186 (Fla. App. 1963); *Byrd v. State*, 178 So. 2d 886 (Fla. App. 1965); *Brady v. State*, 190 So. 2d 607 (Fla. App. 1966); 72 A.L.R., p. 579; 40 A.L.R. 2d, p. 22. The Commission correctly found

that the evidence was insufficient to support a finding that Judge Kelly had a mental or emotional disability that seriously interefered with his conduct as a circuit judge. However, it was appropriate for the Commission to make reference to this testimony in determining whether the Judge, by reason of his conduct in the various matters charged, destroyed confidence in the Court and in the efficiency of the petitioner.

Because of the nature of the proceeding, the doctrines of res judicata and double jeopardy do not apply. The Commission may at any time consider any acts of misconduct which reflect adversely upon the general character and fitness necessary to the proper performance of the duties of judicial office. The accumulation of minor incidents may only justify a reprimand at this time, but, if continued, may result in unbecoming conduct sufficient to warrant removal from office. The reprimand does not amount to an acquittal, nor does it have the elements of a final judgment necessary to invoke the principles of res judicata. See 10 F.L.P., *Former Adjudication*, § 8.

Petitioner also contends that the proceedings before the Commission denied him due process of law in violation of the Fourteenth Amendment to the United States Constitution and the Declaration of Rights of the Florida Constitution in that the Commission was illegally constituted, being vested with the functions of investigation, prosecution, grand jury, and judge and jury of facts and law.

The proceedings were in accord with that established by Sec. 17A, Art. V, *Fla. Const.*, and the Rules of Procedure adopted by this Court.

The following appears in *Annotation*, 98 Law Ed. 855:

> "Procedural due process, that is, the element of the due process provisions of the Fifth and Four-

> teenth Amendments which relates to the requisite characteristics of proceedings seeking to effect a deprivation of life, liberty, or property, may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact (that is, he must be given notice of the proceedings against him); he must be given an opportunity to defend himself (that is, a hearing); and the proceedings looking toward the deprivation must be essentially fair."

And further, on page 857:

> "Proceedings looking toward the suspension or revocation of a medical or legal professional license are free of any due process defect, so far as procedure is concerned, so long as the basic requisites of notice and hearing are complied with; the form of the notice and hearing is immaterial."

Attorneys were retained to present the charges and petitioner had the benefit of counsel in his defense. In fact, the hearing afforded petitioner met all the standards of judicial procedure. The findings of the Commission were not made until after a fair investigation and with such notice, hearing and opportunity to answer for the petitioner as would constitute due process. See *Annotation*, 6 Law Ed. 2d 1332.

While the Judicial Qualifications Commission is not technically a judicial tribunal, its findings and recommendations should be considered as though an intermediate agency of this Court. The Commission is in fact an arm of this Court dealing with a vital function of the Court and under its exclusive jurisdiction. While the power to render the ultimate judgment in these cases is vested in this Court, the findings and recommendations of the Florida Judicial Qualifications Commission are entitled to receive due consideration and are of persuasive force. The Constitution requires that the Commission be composed of:

"(a) Two judges of the district courts of appeal appointed by the judges of those courts and two circuit court judges appointed by the judges of those courts.

"(b) Two members of The Florida Bar, who shall have practiced law in this state for at least eight years, appointed by the board of governors of The Florida Bar; and

"(c) Three citizens, each of whom shall have been a resident of this state for at least five years, neither of whom shall be a justice or judge of any court, active or retired, nor a member of The Florida Bar, appointed by the governor." Sec. 17A(2), Art. V, *Fla. Const.*

In view of these constitutional provisions prescribing the composition of the Commission, its findings should be given great weight. However, the ultimate responsibility of making a determination rests with this Court, for Sec. 17A(3), *Fla. Const.*, requires that the Supreme Court, after reviewing the record, "shall order removal, discipline or retirement, as it finds just and proper, or wholly reject the Commission's recommendation."

The findings of the Commission comntained the following:

> "The publicity incidental to the filing of this petition did bring the Sixth Judicial Circuit into disrepute and, as testified to, it was known as the "sick" Circuit. Certainly the public has a right to know of the affairs of its judicial system and our finding is not a criticism of the public's right to know of the court's operation. Our finding is that Judge Kelly failed to follow recognized methods of proposing changes in judicial procedure, that he failed to cooperate with his fellow Judges in that he did not afford them an opportunity to be aware of his charges and the contents of the petition or give them an opportunity for consideration thereof

prior to filing. Rather, he was more interested in creating controversy and in publicity for himself than in accomplishing court reform.

"It is our conclusion that said conduct and activities violated Canons 8, 20, 21, 23, and 34 of the Canons of Judicial Ethics as adopted by the Supreme Court of Florida."

The Canons of Judicial Ethics referred in the findings are as follows:

"8. Court Organization.

"A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

"It is desirable too, where the judicial system permits, *that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.*" (Emphasis supplied)

"20. Influence of Decisions upon the Development of the Law.

"*A judge should be mindful that his duty* is the application of general law to particular instances. *that ours is a government of law and not of men,* and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. *He should administer his*

office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law." (Emphasis supplied)

"21. Idiosyncrasies and Inconsistencies.

"Justice should not be moulded by the individual idiosyncrasies of those who administer it. *A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court.* Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

"In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency." (Emphasis supplied)

"23. Legislation.

"*A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice;* and to ascertain whether they tend to impede the just disposition of controversies; *and he may well contribute to the public interest by advising those having authority to remedy defects of procedure*, of the result of his observation and experience." (Ephasis supplied)

"34. A summary of Judicial Obligation.

"In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of

public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity." (Emphasis supplied)

The findings of the Judicial Qualifications Commission are amply supported by the record and are approved and adopted by this Court.

The crucial question is whether the activities of the petitioner were for the purpose of effecting court reform or for the purpose of securing personal notoriety and furthering a career in politics.

There were many witnesses who testified on behalf of petitioner and he has enjoyed popularity among many of the electors. Any arm of government should be reticent in exercising the power to nullify the elective process by discipline or removal of elected officials. But this constitutional power, granted to this Court by the mandate of the people, should be exercised when the judiciary is endangered by a judge seeking to bolster his personal image.

Ordinarily, elected officials who wish to stay in office must organize their behavior according to rational standards; if not, they are likely to be defeated at the polls or at least will face expensive and harrowing campaigns for re-election. Under our system, where judges are elected, the members of the judiciary are constantly enmeshed in the conflict between candor and responsibility—maintaining the candor of the politician without shirking the responsibilities of a judge. The Judicial Canons of Ethics provide the guidelines for the conduct of our Judges.

The personal integrity, intellectual vigor, and selfless dedication of a judge should be directed toward the attainment of what he earnestly believes to be sound law, wise public policy, and justice. Candid discussion and mutual trust among the judges of a court are of great value in attaining these ends. These are the responsibilities of a judge. In his candor as a politician, an individual judge should never protest or dissent in such a manner as to discourage the free exchange of ideas within the court, for this free exchange of ideas is an important function in the judicial process of reaching the goal of sound law, wise public policy, and justice.

It may often be difficult for a judge to work toward overturning a ruling or an administrative policy of the Court without injuring or risking injury to the prestige of the Court. Stirring up resistance among fellow judges by threatened adverse publicity is fraught with danger. It is dangerous to the judge's position within the Court since his colleagues may take such a threat as an act of institutional disloyalty. It is dangerous to the possible future success of his own policies. Moreover, it could be dangerous to the prestige and general power of the Court in encouraging not only additional opposition, but also attacks from misinformed groups and agencies who happen to be alienated by virtue of some former decision or policy of the Court.

The candor of petitioner as a politician resulted in a large group of dedicated followers, but, in the final analysis, his candor as a politician caused him to shirk his responsibilities as a member of the judiciary. Every man in public office hungers for public esteem, but no man has the right to buy this esteem with the stolen coin of other men's public reputations, not even a twice-elected member of the judiciary.

The petitioner clearly violated the basic principles of the Canons of Judicial Ethics. Continued violations of these principles by a judge could make our judiciary another Samson, blind to duty and swollen with power,

pulling down the pillars that support our most cherished institutions.

The Commission has recommended that petitioner be required to discharge the duties of resident Circuit Judge of Pasco County in the Sixth Judicial Circuit and refrain from service in Pinellas County of the Sixth Judicial Circuit unless assigned by the Presiding Judge of the Circuit to duty in Pinellas County, pursuant to Rule 1.020(c) (4), Florida Rules of Civil Procedure.

Sec. 17A (3), Art V, Fla. Const., authorizes this Court to order "removal, discipline or retirement as it finds just and proper." This authorization does not contemplate an order limiting the activities of a duly elected Circuit Judge to a specific area in the Circuit. The Presiding Judge has the authority to enter such orders as may be necessary "for the efficient and speedy disposition of the business of the Court." Rule 1.020(c) (1), Florida Rules of Civil Procedure. Matters of internal administration should be left to the Presiding Judge. The recommendations of the Commission are modified so as to strike therefrom subparagraph (d), reading as follows:

> "In accordance with his admission that there is sufficient work in Pasco County to keep him occupied on a full time basis, that he discharge the duties of a resident Circuit Judge of Pasco County in and for the Sixth Judicial Circuit, and refrain from service in Pinellas County of the Sixth Judicial Circuit, unless assigned by the Presiding Judge of said Circuit to duty in Pinellas County pursuant to Rule 1.020(c) (4), Florida Rules of Civil Procedure."

Petitioner Richard A. Kelly has engaged in conduct unbecoming a member of the judiciary and he is hereby publicly reprimanded for such conduct. The said Richard A. Kelly is admonished to comply with his oath as

a member of the judiciary and to abide by the Canons of Judicial Ethics as a member of the judiciary, particularly in cooperating with his fellow judges, following the normal method for seeking procedural changes as to the administration of justice in the Sixth Judicial Circuit, and refraining from seeking personal publicity or attempting to advance his personal ambitions through the public information media. The entire record of this inquiry may be introduced into evidence in any subsequent inquiry which may be brought before the Judicial Qualifications Commission concerning Richard A. Kelly.

It is so ordered.

THORNAL, CARLTON and BOYD, JJ., concur

ERVIN, C. J., dissents with opinion

LARKIN and LaMOTTE, Circuit Judges, dissent and concur with ERVIN, C. J.

ERVIN, C. J., dissenting:

The charges against Judge Kelly and the findings of the Commission from the evidence taken thereon do not logically appear to me to fall within the category of habitual judicial intemperance or unbecoming judicial conduct as contemplated in Section 17 A(3), Article V, State Constitution.

First, I do not find from the record that Judge Kelly violated constitutional sanctions against judicial intemperance and unbecoming judicial conduct by his action of filing with the Clerk of the Circuit Court of Pinellas County a document, styled "Petition to the Judges of the Sixth Judicial Circuit in the Circuit Court of Pinellas County," which generated certain attendant publicity. I do not find from the record that Judge Kelly's proposals for administrative judicial reform in his

circuit "were presented in such a manner as to create turmoil, confusion and chaos within the Circuit."

It appears that in filing his petition and submitting to interviews by press representatives concerning it, Judge Kelly was seeking reconsideration by his fellow judges of his proposals as well as explaining to the public his side of the disagreement which had resulted in a majority of the judges in the circuit requiring him to resign as presiding judge, to which post they had elected him. In his petition, he sought to justify certain changes he had inaugurated as presiding judge in the procedural and administrative work in the circuit, as well as certain proposals he had submitted to his fellow judges to achieve alleged reforms in handling the judicial work of the circuit. He set forth in his petition criticisms of certain conditions in the circuit which he alleged were detrimental to good judicial administration.

By filing the petition he appears to have followed the tradition of free citizens who having suffered the smart of official demotion or public censure make public their side by way of explanation or justification. If, for example, the grand jury of the county censured him, he would be within his rights to make some reply or defense if he desired. No doubt certain quiet-souled judges, upon being similarly displaced as was Judge Kelly and seeing their hopes for certain judicial reforms evaporate, would have resignedly accepted the situation without murmur; but it was not constitutionally required that Judge Kelly follow a like course. Each man's reaction or rejoinder to frustration or provocation conceivably will differ in kind or degree.

The Judicial Qualifications Commission concludes Judge Kelly's related action was motivated by personal vanity to bolster his public image and to revenge himself upon some of his colleagues who had disagreed with him and required him to resign as presiding judge of the circuit. I am unable to agree. I am constrained to believe the Commission's finding reaches too deeply into

the psychological motivation of the Judge in a very nebulous, debatable area. It would be just as easy to infer his motivation was confined to an explanation and justification of his views on court reform and was designed to enlist public support for his proposals without vindictiveness or malice. Aside from psychological considerations, the external trappings or methods of his response to his colleagues' demotion of him appear not to be abusive, contumacious, malicious, or ruinous, and at any rate were permissible in law under the First Amendment privilege.

I believe Judge Kelly had an untrammeled right to publicly explain his side of the disagreement with certain of his judicial colleagues; petition or appeal to his colleagues for reconsideration; and seek public understanding and support of his proposed reforms. Since a majority of his judicial colleagues brought about his removal as presiding judge, he had a kind of "qualified privilege," to borrow a phrase from the law of libel, to publicly explain his side of the affair in moderate, unmalicious, and unabusive language. Certainly he, a judge periodically subjected to the elective process to retain his judgeship, had cause to feel aggrieved by the turn of events that affected his public stature or figure and in the constitutional scheme of free expression could seek a reconsideration by his colleagues as well as justify to the public his side of the affair and did not have to stand mute under the circumstances merely because he is a judge. Further, Section 23 of Rule A, "Ethics Governing Judges," authorizes judges because of their judicial experience to advise "those having authority to remedy defects of [judicial] procedure" of the results of their observation and experience as a contribution "to the public interest." This Judge Kelly did in his petition to his fellow judges, who are authorized to submit local court rules changes to this Court for approval.

I do not find from the record that his public reaction to his colleagues' demotion of him was either malicious abusive, profane, contumacious, arrogant, or

hostile, or that it passed beyond the bounds of judicial decorum or good taste. It did not descend into rancorous personality or verbal impropriety. He made no personal attack on any of his fellow judges nor did he in anywise impugn the character of any of them, although he incidentally criticized their judgment in disagreeing with his proposed reforms.

Underlying the charge of which the Commission found him guilty is the impact caused by the attention given his petition in the local press. Moreover, although the Commission claims its inquiry was not concerned with the "content" of the petition, its brief somewhat inconsistently implies that Judge Kelly's criticisms are not protected against reprisal because the criticisms are not "constructive." Obviously, the Commission's recommendations proceed upon the theory that the contents of the petition allegedly embarrassed the other judges of the Sixth Circuit and lowered the image of that Court. I do not believe his fellow judges should have been so sensitive to the attendant publicity since news reporting in areas of public interest is a fact of life. The Commission should realize also no cloak of immunity can shroud the judiciary from interventions of the press.

This is not the first case in American jurisprudence involving public criticism of the judiciary. Other courts have clearly set out the boundaries within which critics must remain. Fortunately for our democratic society, these boundaries are wide.

Before any man may be punished for speech in a newspaper critical of the courts, the record must show that his criticism has created a clear and present danger of disrupting the administration of justice. Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed. 2d 569 (1962); Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1946); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed 1295 (1945); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

Disruption of the administration of justice is shown by evidence that a particular party to litigation has been prejudiced, that the outcome of a trial has been influenced or that a petit jury has been affected; Wood v. Georgia, supra.

With respect to a judge's sensitivity to newspaper criticism, the United States Supreme Court has stated:

> "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Craig v. Harney, supra, at 331 U.S. 376, 67 S.Ct. 1255.
>
> [Newspaper criticism] . . . "may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess . . ." Pennekamp v. Florida, supra, at 328 U.S. 348, 66 S.Ct. 1038

Furthermore, the effectiveness of such criticism is immaterial when the question is whether the criticism is to be punished:

> "Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." New York Times v. Sullivan, 376 U.S. 254, 273, 84 S.Ct. 710, 772 (1962).

Judge Kelly unquestionably had the right to speak publicly on a matter so fraught with public concern as the administration of the courts in the Sixth Judicial Circuit without incurring judicial sanctions, even if his petition was incidentally critical of his fellow judges. As the United States Supreme Court observed in Pickering v. Board of Education, 391 U.S. 563, 570, 88 S.Ct. 1731, 1735 (1968):

> "[T]o the extent that the Board's position here can be taken to suggest that even comments on the matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it."

The truth may not be punished, either criminally or civilly. Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Moreover, even if Judge Kelly's criticisms of official conduct in the Sixth Judicial Circuit were in error factually and were defamatory (a matter not charged against him), Judge Kelly would remain protected by the constitutional guaranty of free speech, so long as there has been no finding that his statements were knowingly false or made with reckless disregard of their truth or falsity. Pickering v. Board of Education, supra; New York Times v. Sullivan, supra; Garrison v. Louisiana, supra; St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

It is clearly unconstitutional to require any man to present his ideas to official authorities for their prior consideration and approval. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1964) It is equally unlawful to threaten an individual with loss of public employment for exercising his constitutional right to speak out on matters of public concern. Pickering v. Board of Education, supra. Consequently, in order that Article V, Section 17 A of the Florida Constitution may be compatible with the First and Fourteenth Amendments to the United States Constitution, it must not be permitted to censor free expression.

Tragic implications could result from the precedent of discipline of Judge Kelly for speaking out on the need for court reform. The people of Florida will suffer if their judges must restrict their public statements to uncritical banalities in order to avoid the threat of similar sanctions. The right to disagree with others in matters

of governmental policy is one of the cherished rights of American citizenship. It cannot be watered down by a board of censors or subjected to the possibility of sanctions that make its exercise a fearful prospect. The courts exist to serve the people. If the courts are not operating as efficiently as is humanly possible, then the people have the right to hear this from the individuals who are best able to tell them—the judges.

If the First Amendment does not protect a judge's right to speak in circumstances such as these, then we are bound to have in Florida a timorous lot of judges lacking independence, afraid of their judicial shadows, and fearful to exercise conscientiously the right to speak out in favor of judicial reform.

I do not believe the reach of the Code of Ethics Governing Judical Conduct can be construed to deny Judge Kelly his privilege of speaking out under the related circumstances or that in doing so he violated the code. In the setting in which he exercised his right to speak he had certain inherent privileges, if not a duty to seek judicial reform. In the context within which he spoke, we note: He is a judge in a multi-judge circuit (there are twelve incumbent Circuit Judges in the 6th Circuit); in fact, until removed, he was the duly elected presiding judge. Such a circuit, with multiple judges, in the matter of division of the judicial labor therein alone involves many administrative and procedural problems which reasonably could be the concern of any of the circuit judges justifying him to suggest changes and reforms. Judge Kelly, *a judge elected by the people*, had advocated certain things he considered would reform and improve the judicial machinery of his circuit. As presiding judge, he put into effect some of the changes he advocated. For his pains in seeking changes, whether correct or misguided, he was relieved of his status as presiding judge and undoubtedly suffered diminution of public stature. At this juncture he attempted by petition to get his fellow judges to reconsider and he sought to explain to the public his side of the affair and appealed

for public support in behalf of the changes he proposed and the reforms he alleged were necessary. I do not find that what he did or sought to do passed beyond the bounds of judicial decorum or good behavior, or publicly trespassed upon those hallowed precincts of the judiciary which, according to some, can only be entered into with propriety in secret conclave with the priesthood of fellow judges and such matters as Judge Kelly raised there discussed, but never in the "sunshine" of lay publicity. Moreover, I think he had First Amendment protection for what he did.

Second, the other matters charged against Judge Kelly are equally without redeeming merit. There was much rehash of old charges of judicial intemperance and arrogance against Judge Kelly concerning his alleged conduct in court and his alleged hostility and mistreatment of certain attorneys. Many of these charges previously went down the drain and were not vindicated in early legislative impeachment attempts against him or were based on incidents transpiring before the adoption of Section 17 A of Article V, under which the Commission functions.

Numerous witnesses, including nineteen lawyers, three bailiffs, three court reporters, twenty-four jurors, overwhelmingly refuted various facets of the charges. Most of the charges emanated from disgruntled court personnel. Testimony by witnesses to his courtroom conduct establishes Judge Kelly as a competent and temperate judge. Trial lawyers of statewide and national reputations and jurors testified he was fair to all litigants and courteous to attorneys and jurors and made well-considered rulings.

There was no substantiation by competent evidence that the Judge was mentally or emotionally irrational and the Commission did not so find.

Judge Kelly admits to being somewhat of a reformer, particularly in the judicial area—a trait which is

often suspect by those who cling to the status quo. However, this trait, even if displeasing to lovers of ancient or outmoded forms, ought not be equated with irrationality or mental instability.

More than sixty-five witnesses, including two physicians, testified the Judge had never manifested any form of irrationality, even upon tense circumstances.

I conclude no clear and convincing showing substantiates the second charge.

In summation, I think this is a regrettable inquiry that probably ought never to have been pursued. The Commission should have been extremely cautious in launching an inquiry in the sensitive area of an elected official's inherent right to function in the sphere of free expression.

There is every reason why a corrupt, senile, insane, venal or obviously vindictive judge should be subjected to inquiry. So should one whose conduct is so habitually gross it clearly passes beyond the bounds of traditional and well-recognized judicial decorum or whose lack of a becoming judicial demeanor or whose arrogance obviously reaches the point of habitual intemperance. The Commission can unquestionably discipline in those areas of judicial conduct. But here the Commission in its very first inquiry essayed to venture into a very nebulous and debatable situation involving the psychological motivation of a judge and in the process equated his right to speak out on the subject of judicial reform as the prime example of his unbecoming conduct and bad behavior.

By so venturing, we have at our threshhold for the first review of findings of the Commission, issues that set at stake the most fundamental concepts of a free democratic society.

The Commission brings into question the right of an *elected* judge to speak publicly on matters of public concern and the right of the people of this state to be

informed of the administration of an important function of their government. The courts of this country have jealously guarded these rights against encroachments of all kinds.

Central to this democratic process is access to accurate information, for without this information the people cannot exercise their control of government.

Judge Kelly, a knowledgeable judicial officer with several years' experience on the bench, as a part of his effort to obtain what he considered to be judicial reform in his circuit, told the public what he felt they needed to know about the administration of a vital arm of government. By filing his petition in furtherance of his proposed changes, Judge Kelly sought reconsideration by his fellow judges and supplied information upon which he expected the people to make a judgment concerning his disagreement with his fellow judges about the needs he alleged were essential for court reform. Petition filing is constitutionally "established procedure" in this country for presenting information and recommendations relative matters of governmental policy to affected officials and in the bargain may appeal to the public for consideration and support. It is a method that has never been constitutionally condemned, since it is one of the principal elements of the democratic process. It would be unfortunate to excise from the democratic process the troublesome willingness of a judge to publicly make known his feelings about court reform.

Woven throughout the fabric of these proceedings is a disturbing question: Under what conditions may the elective process be nullified by the discipline or removal of elected judicial officials? The question is a disturbing one because in a democratic society the people's elected officials should not be disturbed in their tenure except in instances of great aggravation.

This question has never emerged in sharp focus in these proceedings but is present nonetheless. Undoubt-

edly. Most thoughtful people who have come into contact with this case are troubled by it. Everyone would undoubtedly agree that the corrupt, the senile, and the insane have no place in the judiciary and that the people of this state, whose votes approved Article V, Section 17 A of the Constitution, reasonably believed that the Commission would discipline any members of the judiciary who were corrupt, senile or insane. However, there is no showing in the record before this Court that Judge Kelly is corrupt, senile, or insane. The question then recurs whether he was blatantly and maliciously guilty of habitual inteperance or unbecoming judicial conduct. Was his judicial conduct habitually gross and abusive?

Judge Kelly did criticise the matter in which the circuit was being operated. In so doing he "rocked the boat," and annoyed some of his fellow judges, who professed to being embarrassed by the attendant publicity. For this, the Commission has recommended that he be punished. From this recommendation the question arises whether the people of this State knew when they voted on Article V, Section 17 A, that the Judicial Qualifications Commission would proceed against a judge who spoke publicly of the need for court reform.

I glean from the record that Judge Kelly appears to believe in popular control of government and efficient courts. He believes he has a duty to inform the people about inefficient conditions in their courts. He admits he so informed the people. Judge Kelly submits, however, that speaking out on a matter of such public concern today as the efficient administration of the courts is an exercise of his constitutional rights and fulfillment of a positive duty and is not habitual intemperance or unbecoming judicial conduct. I am constrained to agree with him because I believe his speaking out in the premises is constitutionally guaranteed.

I would dismiss the charges against him.

LARKIN and LaMOTTE, Circuit Judges, concur

IN THE SUPREME COURT OF FLORIDA

JULY TERM A.D. 1970

MONDAY, SEPTEMBER 14, A.D. 1970

Inquiry Concerning A Judge No. 1
Richard A. Kelly, Circuit Judge

Case No. 38,595

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby, denied.

SID J. WHITE
Clerk Supreme Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida and Appendix "A" have been furnished by U.S. mail, postage prepaid to Honorable William D. Hopkins, Attorney for the Forida Judicial Qualification Commission, Supreme Court Building, Tallahassee, Florida 32302; and to the Cerik of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32302, on this _____ day of December, 1970.

JOHN W. BOULT, ESQUIRE, OF
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